IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 774

JACK BARG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Supreme Court of the United States:

The People of the State of Illinois object to the issuance of a Writ of Certiorari in the above cause for the following reasons:

I. Petitioner's claim of a federal constitutional right was not asserted in the trial court nor was it raised by assignment of error or in the briefs in the Supreme Court of Illinois. It was suggested for the first time, without argument, in a petition for rehearing. Federal appellate jurisprudence requires that a federal question arising in state courts be asserted in conformity with the rules of state practice unless those rules themselves are unconstitutional. Having neither observed the applicable Illinois Rules nor challenged the federal constitution-

ality of those rules, the defendant has waived any federal question which might have arisen upon the record in the instant case.

II. Even if the record disclosed that the evidence in question was obtained by an unlawful search and seizure, conviction in a **state** court upon such evidence does not violate any **federal** constitutional right.

III. Although the question of the legality of the search and seizure is not properly before this court, nevertheless the record shows that search and seizure is entirely lawful because it was incidental to an arrest for an offense committed in the presence of the arresting officers.

BRIEF IN SUPPORT OF THE FOREGOING ANSWER.

The points made in this brief are set forth without argument, in the form of propositions, in the foregoing answer. Respondent accordingly adopts those propositions as its preliminary summary of the following argument.

I.

If any question of the federal constitutional rights of the petitioner could have been raised on the record, such question was waived (1) by failure to raise it in the trial court and (2) by failure to raise it in the Supreme Court prior to petition for rehearing.

The question of the constitutional rights of petitioner was not raised in the trial court. An examination of the record at page 21 shows no motion whatever for a finding on constitutional grounds. This was necessary under the laws of the State of Illinois.

People v. *Esposito*, 296 Ill. 535.
People v. *Pierce*, 296 Ill. 327.

The only exception to this rule occurs where the law under which a defendant is convicted is void or unconstitutional. This situation does not arise in the instant case.

Again, at pages 21 and 22 of the record, petitioner's assignment of errors in the Supreme Court is set forth. There are thirteen of them, but not one of them raises any constitutional question. They have to do with admission and rejection of evidence with the sufficiency of the evidence. Assignment 10 sets out that there is no such law as larceny of an automobile tire in the State of Illinois; whereas Chapter 38, Section 397-A, Illinois Revised Statutes provide that the stealing of a motor vehicle tire, regardless of the value thereof, is punishment by imprisonment in the penitentiary. It is shown later that this statement is an inadvertence of counsel. The law is cited and discussed hereafter.

Petitioner in the Supreme Court of Illinois, after his conviction, filed a lengthy petition for a re-hearing, record 32 to 48, in which for the first time the constitutional question was raised. Not having raised it in the briefs originally filed, petitioner was not in a position after the decision of the Supreme Court to raise new questions on petition for re-hearing. All points on which petitioner desired rehearing must have been raised in the briefs.

People v. *Snyder*, 279 Ill. 435.

II.

Reception in a state court of evidence which has been illegally obtained violates no federal constitutional right of the accused.

The petitioner assumes, without either authority or argument in support of his assumption, the proposition that *if* the evidence in question had been obtained by an unlawful

search and seizure a confiscation based upon such evidence would violate some *federal* right of the accused. This proposition, which must necessarily be the initial premise of petitioner's argument, is completely untenable.

Of course, petitioner does not suggest that the sixth amendment to the Federal Constitution, which prohibits unreasonable search and seizure, is applicable to the states, because the contrary is too well settled.

> *Ohio* v. *Dollison*, 194 U. S. 477;
> *Brown* v. *New Jersey*, 175 U. S. 174;
> *Spies* v. *Illinois*, 123 U. S. 131.

Petitioner does, however, invoke the fourteenth amendment in support of his contention. But it is a first canon of the construction of that amendment that, unlike the specific guaranties confirmed as against the Federal government by the Bill of Rights, the due process clause protects only those rights which are **recognized by the almost universal consensus as being of the very essence of fairness and justice**. This court has many times held that, for example, neither the right to trial by a jury of twelve nor, at least as deriving from a universally applicable precept (even the right to counsel is guaranteed in State courts by the Fourteenth Amendment, even where such rights would exist in the Federal courts by virtue of the Bill of Rights. On the other hand, such fundamental rights as the opportunity to be heard before some tribunal before condemnation or of course the right to an impartial investigation of the facts, cannot be denied without violation of the due process clause.

Evidence which conclusively proves or at least which would fairly support a conviction is none the less probative because it has been illegally seized. Evidence thus seized is as **relevant** as though it had been obtained by lawful means.

The only question, then, is whether the fact of illegal seizure has so universally condemned its admission that a *federal* right may be claimed when such evidence is admitted in a *State* court?

Once it is perceived that the test is general consensus, relator's argument is seen to have no foundation. Since the question is not one of federal jurisprudence but is merely to whether there is such universality or at least such overwhelming preponderance of opinion that the decision of the Supreme Court of Illinois must be said to offend the first principles of fair play, it would appear that, to determine such a question of consensus, resort to text commentary might be even more persuasive than the consideration of comparatively few particular cases.

In Corpus Juris Secundum, Title *Criminal Law*, section 657, volume 22, page 1006, the following statement is made:

> "**In the majority of jurisdictions evidence is competent against the accused although it has been obtained by an illegal search and seizure.**
>
> "In the absence of a provision in the organic or statutory law expressly rendering the evidence inadmissible, the rule in the majority of jurisdictions is that evidence obtained by an unlawful search and seizure in violation of constitutional or statutory provisions, see the C. J. S. title Searches and Seizures § 1 *et seq.* also 56 C. J. p. 1154 note 2 *et seq.* is nevertheless admissible. This is the rule in some jurisdictions where formerly such evidence was incompetent against accused."

Literally hundreds of cases are cited in support of the text. Such great states as New York (*People* v. *DeVore*, 150 N. E. 585, 242 N. Y. 13), California (*People* v. *LeDoux*, 102 Pac. 517, 157 Cal. 537), Massachusettes (*Commonwealth* v. *Kozlowsky*, 138 N. E. 14, 243 Mass. 538), as well as most of the other states, adhere to this rule.

It is true that Illinois and the Federal courts enforce the minority view, which view makes the admissibility of physical evidence depend in part upon the history of the acquisition of that evidence. But the foregoing authorities are sufficient to show that the Illinois rule, even though it coincides with the Federal rule, embodies no general principle of due process of law. For these reasons, it is evident that, even if we grant, for the sake of argument, that the evidence in question was illegally seized, its admission did not violate the fourteenth amendment.

III.

Even if the question of lawful search were before this court as though it were a Federal question, the judgment should be affirmed because the search was clearly lawful.

Petitioner discusses at some length the evidence at his trial in the criminal court of Cook County. He contends that the tires in question should not have been allowed in evidence because they were illegally taken from his automobile after an illegal arrest. Aside from the fact that no objection was made upon any ground asserting a right under the Federal constitution, nor was the Federal constitution involved by assignment of error in the Supreme Court of Illinois, the evidence does not support this contention of petitioner. Petitioner admits that he was out around 3:00 o'clock in the morning driving with another man. The officers who arrested him stated that they followed his car and arrested him because his car had no lights on it.

We think that any court would take judicial notice of the fact that 3:00 o'clock A. M. in the latitude of Chicago is night and before sunrise. The Statutes of Illinois provide that from the period of sunset to sunrise a motor vehicle should have two white lights in front and a red light on the rear, and provides that it shall be a misdemeanor to violate this provision of the Motor Vehicle Act; and the

Motor Vehicle Act provides that a person so convicted shall be fined not less than $1.00 nor more than $100.00 (Section 200 and section 234, chapter 95½, Illinois Revised Statutes 1943). Thus, from the undisputed evidence in the record, it may be seen that the petitioner was violating the laws of Illinois in the presence of the police officers. Under the Illinois Statute, the officers had a right to arrest him, and having arrested him, had a right to search him.

See also

People v. *Swift*, 319 Ill. 359.
U. S. v. *Chin On*, 297 Fed. 531.
Hughes v. *The State*, 145 Tenn. 544, 238 S. W. 588, (Point 5).

This arrest was legal because the officers found petitioner violating the statute, and as we have said above, it follows that they had a right to search. In searching the automobile, they found certain tires that had been stolen from one Edward F. Gaenzle, the prosecuting witness. Petitioner's car had been seen in the neighborhood of the Gaenzle car and the wife of complaining witness had seen two men descend from petitioner's car and take therefrom the tires and golf clubs which were afterwards recovered by the police. (Rec. 12) (Rec. 13).

We might add here that the police had been warned from their headquarters that this offense had been committed and to be on the lookout for the offenders.

If petitioner were in a position to raise the question in his petition as to his constitutional rights and infringement thereof, on the record that he presents he would not be entitled to any relief. The prohibition against search and seizure is not against all searches, but against unreasonable searches.

People v. *Marvin*, 358 Ill. 426.
People v. *Kissane*, 347 Ill. 385.
People v. *Exum*, 382 Ill. 204.

Petitioner has cited a long list of cases on the question of infringement of constitutional rights but these cases can be clearly distinguished from the case where an officer arrests because he sees an offense committed or has reasonable grounds to believe such an offense was committed. Petitioner here is entirely wrong when he makes the contention and repeats it that he was arrested on bare suspicion. The officer did use the expression "suspicion" but he also gave a concrete reason for that suspicion which was a violation of the Illinois Statutes in respect to having lights on an automobile.

Petitioner says he was not violating any laws of the City or the State, record 6 and 7. It is evident from the record that his counsel took the same position in respect to the lights, not being familiar with the statute thereon, just as there appeared to be lack of familiarity with the statute on the subject of larceny of automobile tires. Counsel representing petitioner here did not represent him in the trial court.

We might add that it is evident from the opinion of the Supreme Court of Illinois why this cause was reversed and remanded with directions to the trial court to enter the proper judgment. Petitioner had been convicted as an habitual criminal, which conviction carried a much heavier punishment than did the ordinary offense of larceny; but stealing an automobile tire under the Statute was not one of the offenses mentioned in the habitual criminal act; hence under the evidence, the petitioner being clearly guilty should have been sentenced for the single offense of stealing automobile tires.

In conclusion we call the court's attention to the fact that the petitioner, on one hand, claimed he was not so drunk that he did not know what was going on and that Levine, the man who was with him, had the keys, yet, on the other hand, he claims that the keys were taken from

him, petitioner, and that he protested against the officers arresting him and taking the car. It seems clear from the record that he could not have been drunk as he remembered everything favorable to himself that occurred on the night of the larceny.

For the reasons above given, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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State's Attorney of Cook County, Illinois,
Counsel for Respondent.